Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.: 78-1851

JOSEPH S. HARRIS

Petitioner,

v.

H. SCHULDT REEDEREI,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

**On Petition for writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit**

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OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is not yet officially reported, but it is made a part of the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are properly set forth in the Petition.

QUESTION PRESENTED

Disagreeing with petitioner's framing of the issues, respondent asserts that the sole controlling issue is:

> Where a longshoreman's injury was caused solely by stevedore's breach of its duty, is the standard of care owed by shipowner under the 1972 Amendments to the Longshoremen's and Harbor Worker's Compensation Act even a material issue?

STATUTORY PROVISIONS

33 U.S.C. Section 905:

> Sec. 5(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

29 C.F.R. Section 1918.2

Scope and responsibility.

(a) *The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in §1918.3(c).*

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

29 C.F.R. Section 1918.3

Definitions.

(a) The term "shall" indicates provisions which are mandatory.

(b) The term "Secretary" means the Secretary of Labor.

(c) *The term "employer" means an employer any of whose employees are employed, in whole or in part, in longshoring operations* or related employments, as defined herein with the Federal maritime jurisdiction on the navigable waters of the United States.

(d) The term "employee" means any longshoreman, or other person engaged in longshoring operations or related employments, within the Federal maritime jurisdiction on the navigable waters of the United States, other than the master, ship's officers, crew of the vessel, or any person engaged by the master to load or unload any vessel under 18 net tons.

29 C.F.R. Section 1918.53

(c) *Electrical winches*

(1) *When the electro-magnetic or other service brake is unable to hold the load, the winch shall not be used.*

(2) Winches shall not be used when one or more control points, either hoisting or lowering, is not operating properly. Employees shall not be permitted to tamper with or adjust electric control circuits.

(3) When winches are left unattended, control levers shall be placed in the neutral position and, whenever possible, the power shall be shut off or control levers locked at the winch or the operating controls.

(emphasis added).

STATEMENT OF THE CASE

In December, 1975, the M/V MEXICAN TRADER called at Hampton Roads to load a partial cargo of tobacco. Prior to arrival in Port, the ship's Electrician inspected and operated all electrical winches to be used in loading cargo, and the ship's crew operated without problem these very same winches in raising the cargo booms for use by the stevedore.

On December 18, 1975, petitioner was working as a holdman in a gang of longshoremen headed by A. Magee. Southern Stevedoring Corporation, an expert stevedoring contractor, had been engaged by the shipowner to load hogsheads of tobacco in the Nos. #1, 3 and 4 holds of the vessel, and it assumed control of the entire loading operation aboard the vessel.

The Harris gang commenced loading hogsheads of tobacco with assistance of the ship's electrical winches in the lower #4 hold shortly after 8:00 a.m. Sometime after 3:00 p.m. the gang was "topping off" with hogsheads within the square of the coaming of the #4 hold at weather deck level having all but completed loading the forward end of both lower and 'tween deck areas.

At approximately 3:15 p.m. on that day, petitioner with assistance was manhandling a draft of three (3) hogsheads of tobacco being lowered by a "stand in" winch operator within the confined #4 coaming area when Harris' right index finger was caught between a hogshead and either the hatch coaming or adjacently stowed cargo.

Leaving the MEXICAN TRADER without assistance and proceeding to the stevedore's office, Harris reported his accident to stevedore timekeeper James Kensworthy, providing a version of this casualty reflecting simply cargo handling negligence on his part and that of his co-workers. The stevedore's accident report, signed by Harris, disclosed that Harris *then* stated, "While landing hogsheads tobacco into #4 forward, *draft swung around,* catching his right hand against the side of the hatch." No mention was made of drifting winches.

On the following day, the very same electrical winches, without repair or maintenance, were operated again by the stevedore's gang without complaint or problem.

According to the petitioner and two (2) fellow longshoremen, the burton winch at the forward end at #4 hold began to drift shortly after loading commenced on the morning of December 18th and continued to sporadically drift at irregular intervals thereafter throughout the day until Harris' accident. Interestingly, all three (3) of these witnesses, giving testimony of drifting winches were "stand-in" members of Magee's gang, and neither gang boss Magee nor regu-

lar winch operator Lamb were called as witnesses despite the fact that both of these longshoremen were under subpoena by the petitioner, present at Court, and were the witnesses best able to evaluate the performance of this winch.

Captain Carsten Voege, Supercargo aboard the MEXICAN TRADER, undisputably was on and about the deck of that vessel consulting with the stevedore foreman throughout this loading and he received no complaint regarding the winches either personally or through watch officers reporting to him. Testimony of complaints to a "Mate" regarding drifting winches and more particularly the physical characteristics of such "phantom" officer were conflicting and contested vigorously.

To cite an additional inconsistency in the drifting winch testimony, the longshoremen all recalled sporadic drifting of the burton winch, yet expert testimony by Captain William Wheeler, former President of Cargo Gear Survey and Certification Bureau, indicated that the mechanical characteristics of electric winches of the variety in use aboard the MEXICAN TRADER are such that if a winch begins to drift, then such drifting occurs with each load and becomes progressively worse with extended use.

It was further undisputed that the stevedore did not stop this loading operation at any stage although the purported malfunctioning of the winch lasted over a period in excess of six (6) hours.

Safety and Health Regulations for Longshoremen, 29 C.F.R. 1918.2(a) and 1918.53 place the *sole* responsibility upon the stevedore to cease its loading operation until such an unsafe condition is corrected. The *only* properly qualified stevedoring expert testifying confirmed that *good stevedoring practice* mandated that such operations cease in the face of drifting winches until such condition was corrected.

Furthermore, although not material to the issue herein, Harris' own testimony revealed a careless handling of this draft. All the testimony showed the Plaintiff approached this draft of three (3) hogsheads weighing approximately 3,000 pounds when it was still being lowered and before it had come to rest in a vertical position just off the deck. Expert testimony reflected that such a draft should never be approached or handled until it is at rest particularly when handled in a confined area as where petitioner was then working.

Petitioner's sole explanation for his accident was a sporadically drifting burton winch, yet this explanation was not supported by his own initial version of the casualty, nor the mechanical characteristics of the electric winches aboard the MEXICAN TRADER. More to the point, the stevedore undisputedly continued to operate the winches for over six (6) hours in the face of a Safety & Health Regulation (29 C.F.R. 1918.53) that required it to cease work until the allegedly unsafe condition was corrected.

This case was initially tried before the Honorable Richard B. Kellam and jury on April 5, April 6, and April 10, 1978. Following a verdict in favor of the shipowner, this trial jurist overruled a motion for a new trial.

Contrary to Rule 10A of the Rules of Practice for the Eastern District of Virginia, which require that jury charges be filed at least five (5) working days prior to trial, petitioner did not submit any proposed charge until the trial was well under way. He never requested orally or in writing, a charge properly reflective of his second issue herein, whether "a shipowner owes its longshoremen the duty of exercising reasonable care under the circumstances."

On appeal below, petitioner contested solely the trial court's refusal to charge on the principles enunciated by Section 343A of the Restatement (Second) of Torts. The case

came on for argument before Circuit Judges Winter, Russell and Widener who handed down a per curiam opinion affirming the jury verdict in favor of the shipowner. In so ruling, the Court below pertinently had *solely* this to say about the disputed omission from the charge:

> ". . . Since the requested instruction was concededly contrary to the rule as declared in *Chavis* v. *Finnlines, Ltd., O/Y* (4th Cir. 1978)576 F.2d 1072, and *Riddle* v. *Exxon Trans. Co.* (4th Cir. 1977) 563 F.2d 1103, the district court did not err in refusing the instruction."

The purport of the above comment of the Court of Appeals in affirming the district court's judgment raises the dispositive issue herein. Petitioner has misconstrued the meaning of this ruling, as well as the Fourth Circuit Court of Appeals' view of Section 343A of the Restatement by and through the thrust of his petition.

ARGUMENT

WHERE A LONGSHOREMAN'S INJURY WAS CAUSED SOLELY BY STEVEDORE'S BREACH OF ITS DUTY, THE STANDARD OF CARE OWED BY SHIPOWNER UNDER THE 1972 AMENDMENT TO THE LONGSHOREMEN'S & HARBOR WORKERS' COMPENSATION ACT IS IMMATERIAL.

By the 1972 Amendments to the Longshoremen's & Harbor Worker's Compensation Act (33 U.S.C. 901, *et seq.)*, Congress eliminated the previously prevalent three-cornered law suits involving longshoremen, shipowners and stevedores which were founded primarily on the principle of unseaworthiness, indemnity and occasionally negligence. Under Section 905(b), the Act still allows a longshoreman to sue a shipowner for the latter's negligence, but eliminates the shipowner's all but absolute liability to a longshoreman injured on board its vessel based upon unseaworthiness. The

legislative history of the 1972 Amendments establishes that land-based principles of law shall apply to longshoremen claims founded on negligence. In an almost unbroken line of authority to date, lower courts have recognized this intent and have uniformly applied land-based principles.

Similarly, the lower Courts have consistently recognized that the stevedore has the primary responsibility for the protection and safety of the longshoremen working aboard a vessel. Safety and Health Regulations for Longshoring (29 C.F.R. 1918.2, et seq.), explicitly place responsibility for their implementation upon the stevedore. Discussing the subject of safety, the Senate Report pertaining to the 1972 Amendments specifically stated:

> "It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve *to strengthen the employer's incentive to provide a safe place to work.*" S. Rep. no. 92-1125, 92d Cong., 2d Sess.-2 (1972). (Emphasis supplied).

Likewise, speaking as to the *effect* which a *stevedore's breach of it's duty* was to have on the negligence action against a shipowner under its 1972 Amendment, Congress declared:

> "[t]he purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness,' 'non-delegable duties,' or the like . . . [and] *a vessel shall not be liable* in damages for acts or omissions of stevedores or employees of stevedores subject to this Act [citations] *for the manner or method in which stevedores or employees of stevedores subject to this Act*

perform their work [citations] . . .". 3 U.S. Code Cong. and Admin. News pg. 4703 (1972) (emphasis added).

The Fourth Circuit in considering this case has correctly found that Harris' injuries were caused solely by the stevedore's breach of its duty for which the shipowner is not liable. Stated otherwise, the legal reasoning on which the decision below was grounded did not turn on the standard of care owed by the shipowner whether it correctly be founded on land-based principles of negligence or otherwise.

REASONS WRIT SHOULD NOT BE GRANTED BY THIS COURT

I. DECISION BELOW DID NOT TURN ON STANDARD OF CARE OWED LONGSHOREMAN BY SHIPOWNER.

The premise is erroneous that the Court below has limited the application of Section 343A of the Restatement simply to situations in which the vessel owner is performing its own stevedoring. More important, it is falacious reasoning that *Harris* was decided on such basis, or that the Court's ruling denotes the standard of care required of the shipowner in cases under the 1972 Amendments. To the contrary, the Court below in specifically recognizing the applicability of Section 343A as "a correct exposition of the law" has found the application of that standard inapplicable, or the failure to instruct thereon harmless error, in all three (3) of the cases with which it has been confronted with this issue to date.

As quoted above, the Court below affirmed the jury's verdict here solely because plaintiff's theory of the case was "concededly contrary to the *rule* as declared in *Chavis* v. *Finnlines, Ltd., O/Y,* 576 F.2d 1072 (4th Cir. 1978), and *Riddle* v. *Exxon Trans. Co.,* 563 F.2d 1103 (4th Cir. 1977). . . ."

(emphasis added). To appreciate the basis of the court's ruling then a determination must be made as to the import of the *"rule"* of *Riddle* and *Chavis* and its applicability, if any, to the standard of care owed by a shipowner.

Initially, in *Riddle* v. *Exxon*, 563 F.2d 1103 (4 Cir. 1977) where a shipyard's failure to timely test and maintain the shipowner's vessel in a gas free state during repairs resulted in an explosion injury to its employee, the Court of Appeals pointedly recognized Section 343A as the "modern rule," but deemed it inapplicable and the trial Court's failure to charge thereon harmless error because the accident was due solely to the shipyard's negligence. Speaking in behalf of the Fourth Circuit, Judge Donald Russell observed:

> "[e]ven under the modern rule a vessel is *not liable* for 'open and obvious' dangerous conditions, whether existing at time control of the vessel is relinquished by the vessel or arising afterwards with the knowledge of the vessel, *if the danger is such that the stevedore or shipyard would be expected to correct the condition in the course of discharging its responsibility* for the safety of the longshoreman or shipyard worker." 563 F.2d at 1111-1112 (emphasis added).

Later, in the same opinion, Judge Russell proceeded to set forth the *"rule"* subsequently followed by the Court of Appeals in both *Chavis* and *Harris:*

> "But, whether the statement of the District Court in the challenged instruction was erroneous for not qualifying the vessel's immunity for 'open and obvious' dangers in line with the modern rule [i.e., §343A] is irrelevant in this case and its use by the District Court would, if erroneous, be at most harmless error. *This is so because plaintiff's injuries resulted solely from the negligence of the [shipyard] and its employees;* . . . And this is so, irrespective of whether the condition resulting in plaintiff's injuries was 'open and obvious' or not. Such has recently been the clear holding in four well-reasoned decisions. *Hurst* v. *Triad*

Shipping Co., (3rd Cir. 1977) 554 F.2d 1237; *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, (2nd Cir. 1977) 553 F.2d 837; *Gay* v. *Ocean Transport & Trading, Ltd.*, (5th Cir. 1977) 546 F.2d 1233; and *Teofilovich* v. *d'Amico Mediterranean/Pacific Line*, (C.D.Cal. 1976) 415 F.Supp. 732; 563 F.2d at 1112 (emphasis added).

Following shortly thereafter, *Chavis* v. *Finnlines, Ltd., O/Y*, 576 F.2d 1072 (4 Cir. 1978) involved a situation wherein a stevedore loaded wet and slippery logs aboard shipowner's vessel creating a dangerous condition which a mate allegedly failed to correct by supplying requested dunnage. There, District Judge Walter Hoffman, speaking on behalf of the Court of Appeals, again specifically noted that Section 343A of the Restatement set forth "a correct explanation of the law," but he concluded that the case was exempt from its application and further distinguishable from *Napoli* v. *Hellenic Lines, Ltd.*, 536 F.2d 505 (2nd Cir. 1976 by the reasoning expressed hereinafter:

> While we feel that *Napoli, supra*, contains a correct exposition of law, we nevertheless are constrained to limit its applicability to its facts. In *Napoli*, there was no question the *shipowner*, which was acting as its own stevedore, *allowed the defect to be created before the longshoremen began work*. However, *under the facts of the present case, it appears that the stevedore created the alleged defect*; 576 F.2d at 1079 (emphasis added).

Thereafter, quoting verbatim the entire reasoning of the *Riddle* holding as set forth above, Judge Hoffman concluded, "We feel, in sum, that the proper *resolution* of *this issue* was well stated in *Riddle* . . ." (emphasis added).

Thus, from a careful analysis of *Riddle* and *Chavis*, it appears that the "rule" applied here and the controlling principle of law did *not* deal with the standard of care (i.e., Section 343A) required of the shipowner and the circumstances under which the standard would be applied, but rather a teaching that there can be no recovery by a longshoreman where his injuries were solely caused by the

stevedore's negligence. *Edmonds* v. *Campagnie Generale Transatlantique*, ____ U.S. ____ (1979). The comments of Judge Hoffman pertaining to *Napoli* and its limiting facts are therefore *dicta* at most and certainly not the *"rule"* as enunciated initially in *Riddle* and referred to by the court below in the *Harris* case.

There are like rulings from the Second, Third and Ninth Circuits which have correctly denied the application of Section 343A in those cases where the shipowner could justifiably rely upon the stevedore to fulfill its primary responsibility to the longshoreman by protecting him from the hazards which the stevedore is in the best position to rectify. *Hurst* v. *Triad Shipping Co.*, 554 F.2d 1237 (3rd Cir. 1977); *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837 (2nd Cir. 1977); and *Teofilovich* v. *d'Amico Mediterranean/Pacific Line*, 415 F.Supp. 732 (C.D. Cal. 1976).

Thus, it is clear that *Harris* did not turn on the standard of care owed this longshoreman by the shipowner. Therefore, the *sole* basis on which petitioner seeks his Writ is falacious and ill founded.

II. CONFLICT OF DECISIONS ASSERTED BY PETITIONER IS GROUNDLESS

Petitioner incorrectly asserts that the Court below has established a shipowner's standard of care for the protection of longshoremen which is different from that of other circuits. The Court below has correctly and consistently held that the Restatement (Second) of Torts, Sections 343 and 343A, can each apply in appropriate factual situations. *See, Riddle, supra,* and *Chavis, supra.* The law embodied in these sections and others within the Restatements has been held to be appropriate land-based law which can be applied to measure a shipowners' liability to longshoremen. *See, e.g., Anuszewski* v. *Dynamic Mariners Corporation*, 540 F.2d 757 (4th Cir. 1976), *cert. denied* 429 U.S. 1098 (1977).

As clarified in the preceding section, the rule of *Riddle, supra, followed* in this case, did not turn on the standard of care owed by the shipowner to the longshoreman here, but rather on the stevedore's breach of its duty to the longshoremen which undisputably caused his injury. Moreover, as *Chavis, supra,* is not the subject of this appeal, the comments of visiting District Judge Hoffman upon the factual limitations of the application of the *Napoli* doctrine whether the same be construed as *dicta* or holding, do not \present a proper vehicle for the resolution of conflicting standards, if any, between the Circuits.

While petitioner ostensibly seeks a writ of certiorari on the bases of a supposed conflict between the Second, Fourth and Fifth Circuits as to the standard of care required of shipowner arrived at through the application of land-based principles of law, the principle thrust of his petition is directed to a recent and as yet unreported decision of the Ninth Circuit in *De Los Santos* v. *Scindia Steam Navigation Co., Ltd.*, Civil Action No. 76-3225 (9th Cir. decided May 1, 1979), which suggests that such standard of care previously applied by all the maritime Circuits is erroneous.

In *De Los Santos,* a longshoreman injury claim brought under the 1972 Amendments to LHWCA wherein the trial Court had granted summary judgment to the shipowner by applying land-based principles (i.e., the Restatements) to determine the standard of care owed therein, the Ninth Circuit reversed, concluding that the standard of care should not be founded on land-based principles, but rather maritime ones as enunciated by this Court in the earlier case of *Kermarec* v. *Compagnie Generale Transatlantic,* 358 U.S. 625 (1959). The use of *Kermarec,* however, as precedent is subject to close scrutiny and question in that it involved a passenger claim and not one of an employee of an expert stevedore charged with protecting its employee as is the case here. Furthermore, *Kermarec* was decided prior to the limiting provisions of the 1972 Amendments to LHWCA.

Although the reasons why *De Los Santos* does not provide a contestable conflict between any of the Circuits are numerous, the bases on which a purported conflict should be rejected insofar as pertinent herein are readily apparent:

1. *De Los Santos* remains within the breast of the Ninth Circuit as the shipowner has filed a petition for rehearing en banc which remains under consideration to date. Furthermore, the en banc hearing must consider the recent affirmation by this Court that the 1972 Amendments require the application of a land based and not a maritime standard of care on the part of shipowner, *Edmonds, supra.*

2. The Ninth Circuit decision in *De Los Santos* appears in direct conflict with its decision in *Wescott* v. *Impresas Armadoras, S.A.*, 564 F.2d 875 (9th Cir. 1977) and, therefore, makes both the import and scope of this recent decision unclear.

3. On appeal, *Harris* did not turn on the shipowner's standard of care as discussed heretofore so that the case *sub judice* and *De Los Santos* do not present true conflicting decisions of the Fourth and Ninth Circuits for review.

4. Petitioner did not assert in a proper and timely fashion the *De Los Santos* standard of care at the trial stage of this case so as to provide a properly appealable issue of the shipowner's standard of care before the Court below or this Court.

The conflict alleged by Petitioner is illusory and without merit, and therefore this case is not one that requires the exercise of this Court discretionary jurisdiction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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